No. 96-1425

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Supreme Court of the United States

OCTOBER TERM, 1996

RANDALL A. TERRY, REVEREND PATRICK MAHONEY, A. DAVID HENDERSON, ROBERT JEWITT, JOSEPH J. SLOVENEC, REVEREND JAMES J. RUDD,

Petitioners,

—v.—

JANET RENO, Attorney General of the United States of America, and ERIC H. HOLDER, JR., United States Attorney for the District of Columbia,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CAPITAL WOMEN'S CENTER; COMMONWEALTH WOMEN'S CLINIC; NATIONAL ABORTION FEDERATION; NATIONAL ORGANIZATION FOR WOMEN; PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, DC; GEORGE R. TILLER, M.D.; AND SUSAN WICKLUND, M.D.

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QUESTIONS PRESENTED

1. Whether the Freedom of Access to Clinic Entrances Act, 18 U.S.C. §§ 248 *et seq.*, exceeds Congress' power under the Commerce Clause?

2. Whether the Freedom of Access to Clinic Entrances Act, 18 U.S.C. §§ 248 *et seq.*, violates Petitioners' First Amendment rights?

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Intervenor-Respondents Capitol Women's Center, *et al.*, respectfully submit the following brief in opposition to the petition for certiorari filed by Randall A. Terry, *et al.*, docketed on March 10, 1997.

STATEMENT OF THE CASE

Proceedings Below

Petitioners Randall A. Terry, *et al.*, filed this challenge to the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. §§ 248 *et seq.*, in the United States District Court for the District of Columbia on May 26, 1994, the day FACE was signed into law. On June 27, 1994, Respondents Capitol Women's Center, Commonwealth Women's Clinic, National Abortion Federation, National Organization for Women, Planned Parenthood Federation of America, Inc., Planned Parenthood of Metropolitan Washington, D.C., Dr. George R. Tiller, and Dr. Susan Wicklund moved to intervene as defendants; the district court granted the motion on August 18, 1994. On November 21, 1995, the district court granted Respondent Reno's motion for judgment on the pleadings. Pet. App. 24a-36a. The United States Court of Appeals for the District of Columbia Circuit affirmed on December 10, 1996. Pet. App. 1a-23a.

The Factual Record of Harm to Respondents

Respondents moved to intervene because they will be severely harmed if FACE is enjoined or held unconstitutional. The National Abortion Federation ("NAF") is a professional organization of physicians, nurses, counselors, clinic administrators, and other medical professionals who provide women across the country with reproductive health services. Virulent anti-abortion zealots routinely target their attacks on abortion providers. Individual abortion providers are regularly harassed, threatened, and stalked, and several clinics have been victimized by chemical attacks. See Shaw Decl. ¶¶ 3-7.[1/] In March 1993, a physician

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[1/] The Shaw Declaration, the Johnson Declaration, the Wicklund Declaration, the Tiller Affidavit, and the Codding Affidavit were submitted in support of the Motion to Intervene.

working at a NAF clinic, Dr. David Gunn, was brutally murdered by an anti-abortion militant. *Id.* at ¶ 5; S. Rep. No. 117, 103d Cong., 1st Sess. 3-4 (1993).

The National Organization for Women ("NOW") is a membership organization devoted to securing equal rights for women, including access to reproductive health care. Its over 200,000 members throughout the country include many individuals who use and will use reproductive health services. NOW has been a plaintiff in many cases seeking remedies against the anti-choice extremism that frequently plagues its members. *See, e.g., National Organization for Women v. Scheidler*, 114 S. Ct. 798 (1994); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *New York State NOW v. Terry*, 697 F. Supp. 1324 (S.D.N.Y. 1988), *appeals consolidated & aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

Respondents Commonwealth Women's Clinic in Falls Church, Virginia, and the Capitol Women's Center in Washington, D.C., two clinics that provide a range of reproductive health services, including abortions, have been the targets of various forms of intimidation, harassment, blockades, and violence. In particular, anti-abortion extremists have on numerous occasions rendered impassable the entrances and exits to all of the clinics. Codding Decl. ¶¶ 4-5, 10-13. During one demonstration at the Commonwealth Women's Clinic, anti-abortion zealots physically blockaded all entrances and exits of the clinic, completely disrupting the clinic's activities for several hours and overwhelming the local police department. *Id.* at ¶¶ 4-5. Anti-choice militants have also attempted to injure or intimidate clinic personnel and patients by sending repeated bomb threats and throwing iron bars and rocks through the clinic windows. *Id.* at ¶¶ 7-9. Most recently, the Commonwealth Women's Clinic was forced to close in February 1997 for four days and sustained over $100,000 in damage from an arson attack. National Abortion Federation, *Clinic Support Update: NAF's Report on Anti-Abortion Violence* 1 (March 1997).

Affiliate clinics of the Planned Parenthood Federation have likewise been the targets of numerous instances of violence. For

example, Planned Parenthood Center of Syracuse, New York, sustained extensive damage on April 14, 1994 when a woman posing as a patient poured a pint of a toxic chemical into the clinic's public restroom; the building required evacuation, and staff members suffered respiratory problems. Johnson Decl. ¶ 3. Planned Parenthood clinics in several other states have been subject to bomb threats and the blockading of their doorways and hallways. *Id.* at ¶¶ 4-7.

Anti-abortion militants have forced Respondents Drs. Wicklund and Tiller to practice medicine in a climate of fear and intimidation. Since 1991, extremists have stalked Dr. Wicklund, routinely surrounding her car and house and following her every move. Wicklund Decl. ¶¶ 5-10. Throughout her career, she has also been threatened and assaulted by anti-abortion zealots. She was once assaulted by two anti-choice zealots who leapt from a van, grabbed her, and slammed her against the van, all the while screaming that she was a "baby killer." *Id.* at ¶ 13. Dr. Wicklund has had her freedom of movement regularly impeded by anti-abortion zealots who have blocked her driveway, her car, and her person on a constant basis. *Id.* at ¶¶ 6-10. Moreover, the clinics where Dr. Wicklund has provided services have been attacked by anti-choice extremists, and their entrances and exits have been blockaded on numerous occasions. See *id.* at ¶¶ 11-13. Last month, an anti-abortion activist was arrested for setting fire to one of Dr. Wicklund's clinics; the arson caused about $2,000 in damage, and was extinguished just minutes before burning out of control. Joe Kolman, *Abortion Clinic Targeted*, Billings Gazette, April 3, 1997, at A1.

Dr. Tiller has had similar experiences. His clinic, Women's Health Care Services, has experienced numerous blockades, and a pipe bombing that caused approximately $75,000 in damage. Tiller Aff. ¶¶ 3-4. In particular, during what Operation Rescue called its "Summer of Mercy" in 1991, hundreds of militants surrounded and obstructed access to the clinic, causing the overwhelmed local police department to ask the clinic to close its doors for five days. *Id.* at ¶ 5; H. Rep. No. 103-306, 103d Cong., 1st Sess. 7 (1993). Even after the clinic obtained a federal injunction to prohibit Operation Rescue from blocking the entrances and exits of the

clinic, zealots continued their blockades, including the particularly dangerous and shocking tactic of encouraging children to lie on the street in front of vehicles to prevent patients from coming to the clinic. Tiller Aff. ¶ 6. In 1993, as Dr. Tiller attempted to leave the clinic, he was shot in each arm by Rochelle "Shelley" Shannon, an anti-abortion militant. *Id.* at ¶ 7. The same day, Ms. Shannon also assaulted a nurse at Dr. Tiller's clinic. *Id.*

REASONS THE PETITION SHOULD BE DENIED

Petitioners' request for a writ of certiorari must be denied because they have failed to establish any of the factors that weigh in favor of granting the petition. The Court of Appeals for the District of Columbia has not "rendered a decision in conflict with a decision of another United States court of appeals on the same matter." Sup. Ct. R. 10(a). Indeed, all federal appellate courts to have addressed the issue agree that FACE is constitutional. Nor has the Court of Appeals "decided an important question of federal law which has not been, but should be, settled by this Court, or . . . decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10(c). Recent precedent from this Court makes clear that the extensive congressional findings regarding the impact on interstate commerce of violent and obstructive anti-abortion activities are highly relevant to the question of FACE's constitutionality under the Commerce Clause, *see United States v. Lopez*, 115 S. Ct. 1624 (1995); these finding easily demonstrate that FACE is constitutional. There is no need for this Court to use its limited resources to answer questions which are a matter of settled law. The petition should therefore be denied.

I. THE FEDERAL COURTS OF APPEALS HAVE UNIFORMLY AGREED THAT FACE IS CONSTITUTIONAL.

Far from being a "subject of . . . constitutional controversy," Pet. Brief at 5, there has been complete agreement within the federal courts of appeals that FACE is constitutional. *See United States v. Soderna*, 82 F.3d 1370 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996); *United States v. Wilson*, 73 F.3d 675 (7th Cir.),

cert. denied, 117 S. Ct. 46 (1996); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.), *cert. denied*, 117 S. Ct 613 (1996).; *Woodall v. Reno*, 47 F.3d 656 (4th Cir.), *cert. denied*, 115 S. Ct. 2577 (1995); *American Life League v. Reno*, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995).[2/] Each appellate court has dismissed both First Amendment and Commerce Clause challenges to FACE. *See Soderna*, 82 F.3d at 1373-77; *Wilson*, 73 F.3d at 680-86; *Dinwiddie*, 76 F.3d at 919-24; *Woodall*, 47 F.3d at 657-58; *American Life League*, 47 F.3d at 647-54; *Cheffer*, 55 F.3d at 1519-22. Because there is no conflict between federal appellate courts on the issues for which Petitioners now seek review, there is no need for this Court to grant certiorari. Sup. Ct. R. 10(a).

II. CONGRESS' AUTHORITY TO ENACT FACE UNDER THE COMMERCE CLAUSE IS DEMONSTRATED BY THE EXTENSIVE CONGRESSIONAL FINDINGS THAT FEDERAL LEGISLATION WAS NECESSARY TO ADDRESS A NATIONWIDE CAMPAIGN OF VIOLENCE AND OBSTRUCTION DIRECTED AT REPRODUCTIVE HEALTH CARE FACILITIES, PROVIDERS, AND PATIENTS.

Courts examining the constitutionality of FACE under the Commerce Clause need only determine that "a rational basis existed

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[2/] Several federal district courts have reached the same conclusion. *See, e.g., United States v. Scott*, 919 F. Supp. 76 (D. Conn. 1996); *Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 946 F. Supp. 1355 (D. Or. 1996); *Lucero v. Trosch*, 904 F. Supp. 1336 (S.D. Ala. 1995); *United States v. White*, 893 F. Supp. 1423 (C.D. Cal. 1995); *Cook v. Reno*, 859 F. Supp. 1008 (W.D. La. 1994), *vacated and remanded on other grounds*, 74 F.3d 97 (5th Cir. 1996); *Riely v. Reno*, 850 F. Supp. 693 (D. Ariz. 1994); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422 (S.D. Cal. 1994). Of the two decisions finding FACE unconstitutional, one was reversed and the other is currently on appeal. *See United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis. 1995), *rev'd*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 46 (1996); *Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996), *appeal pending*, Nos. 96-1581, 96-1582, 96-1623 (4th Cir., argued Apr. 9, 1997).

for [Congress] concluding that a regulated activity sufficiently affected interstate commerce," *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995).[3/] Contrary to Petitioners' misleading assertions[4/], a court performing such an analysis "of course consider[s] legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce." *Id.* at 1631; *see also Wilson*, 73 F.3d at 680-83 .

Here, the legislative findings are extensive and easily demonstrate the constitutionality of FACE. Unlike *Lopez*, where Congress made no findings regarding the effects of gun possession near schools on interstate commerce, in enacting FACE, Congress made extensive factual findings on the impact of anti-choice violence and obstruction on the operation of reproductive health clinics and on their impact on interstate commerce. These congressional findings not only bolster the constitutionality of FACE under the Commerce Clause, they also demonstrate why

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[3/] In *Lopez*, this Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922, on the ground that Congress had exceeded its Commerce Clause authority in enacting it. In doing so, the Court set forth three categories of activity that Congress can regulate or protect under its Commerce Clause power: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce,"and (3) "activities that substantially affect interstate commerce." 115 S. Ct. at 1629-30. FACE clearly falls within both the second and third *Lopez* categories. *See Soderna*, 82 F.3d at 1373-74; *Wilson*, 73 F.3d at 679-89; *Dinwiddle*, 76 F.3d at 919-21. Although this brief addresses only the congressional findings relating to the third category under the Commerce Clause, Intervenor-Respondents here adopt Respondent Reno's position in all respects regarding the Commerce Clause and the First Amendment.

[4/] Petitioners attempt to dismiss the congressional findings relied on by the Court of Appeals, Pet. App. 5a-13a, by quoting this Court's notation in *Lopez* that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so,"and that "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question." Pet. Br. at 14 (quoting *Lopez*, 115 S. Ct. at 1629 n.2 (citations omitted)). Petitioners ignore the unmistakable fact that the Court made these remarks not to downplay congressional findings, but rather to stress their importance.

FACE and its continued enforcement are critical to the lives and well-being of reproductive health care patients and providers throughout this country.

A. CONGRESS ENACTED FACE TO CURB THE VIOLENCE AND OBSTRUCTION DIRECTED AT REPRODUCTIVE HEALTH CARE PROVIDERS AND PATIENTS, WHICH POSE A SERIOUS THREAT TO PUBLIC HEALTH AND IMPEDE WOMEN'S ABILITY TO EXERCISE THEIR CONSTITUTIONAL RIGHT TO REPRODUCTIVE CHOICE.

Congress made extensive factual findings of physical obstruction, force and violence directed at reproductive health care providers and patients around the country. These findings make clear that Congress had the authority to enact FACE under the Commerce Clause. As noted in the Senate Report, from 1977 through 1994, the escalation of violent, obstructive and threatening activities by anti-choice extremists against women seeking abortions and their health care providers included over 6,000 clinic blockades throughout the United States, almost 100 physical assaults on providers, and nearly 200 attempted or completed arsons, firebombings and bombings of abortion-related medical facilities. S. Rep. No. 117, 103d Cong., 1st Sess. 3, 5 (1993) [hereinafter "S. Rep."]; *see* National Abortion Federation, *Incidents of Violence & Disruption Against Abortion Providers, 1997* 1 (including incidents reported from Jan. 1, 1977 through March 5, 1997) [hereinafter *Incidents 1997*].[5/] Congress further found that

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[5/] The violent and obstructive activities that interfere with women's access to reproductive health services and with women's exercise of their constitutionally-protected right to abortion have continued since FACE's enactment. Although the number of clinic blockades has significantly decreased since FACE's enactment, *Incidents 1997*, at 1 (seven reported clinic blockades in 1996 compared to 83 in 1993), the number of violent incidents targeting reproductive health care facilities and providers remains unacceptably high. Reproductive health care clinics across the nation -- many of which do not perform abortions -- continue to report serious acts of physical obstruction, death threats, and property destruction. Hearings on

these activities occurred in every part of the United States. S. Rep. at 12-13. Indeed, Congress found that many of these activities were orchestrated by groups functioning on a national scale and operating across state lines, *id.* at 13-14, causing a direct and substantial impact on patients and providers and on the delivery of reproductive health care in interstate commerce. *Id.* at 31-32; *see infra* pp. 16-18.

The Senate Report describes the full range of violent, obstructive, threatening and destructive anti-choice activities utilized nationwide. S. Rep. at 3-11. During blockades -- massive sieges designed to close the doors of women's health clinics -- activists form human barricades that prevent access to and egress from clinics. S. Rep. at 7-11; *see, e.g., Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1424 (W.D.N.Y. 1992), *aff'd*, 67 F.3d 377 (2d Cir. 1995) (en banc), *aff'd in part, rev'd in part*, 117 S. Ct. 855 (1997); *NOW New York State v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). In addition to obstructing access by sitting, lying down, or standing with interlocking arms in front of clinic entrances, S. Rep. at 7, blockaders have invaded clinics and chained themselves to clinic equipment. *Id.* at 8 & n.16 (citing court decisions). Blockaders have trapped patients and providers in cars as well as clinics, and have engaged in scuffles sufficiently violent to injure both clinic personnel and security forces. *Pro-Choice Network*, 799 F. Supp. at 1424.

The Senate Report also notes anti-choice militants' increasing use of destructive and violent tactics such as arson, bombings, firebombings, chemical attacks and other vandalism. S.

Clinic Violence Before the Subcomm. on Labor of the Senate Comm. on Appropriations, 104th Cong., 1st Sess. (1995) (statement of Kay Arndorfer, Acting Executive Director, National Abortion Federation) (approximately $4 million of damage reported from 1993 to May 1995); *Incidents 1997* at 2 (bombing of Atlanta Northside Family Planning Services in February 1997 incurred over $90,000 in damage). In 1996, there were at least 65 arrests in connection with clinic blockades. *Id.* at 1. These incidents have continued during the first 2 months of 1997. *Id.* Accordingly, the continued and increased enforcement of FACE remains necessary.

Rep. at 5-7.[6] In the first half of 1993, arson attacks on just three clinics caused more than $1.5 million in damage and dramatically reduced the availability of abortion services to women in the affected areas. *Id.* at 5-6. Clinics also witnessed an increase in chemical attacks, in which anti-choice extremists injected butyric acid and other toxins with noxious fumes into the facilities. Anti-choice militants poured butyric acid through holes drilled in clinic walls, sprayed butyric acid through locks and under doors, and left this dangerous chemical in clinic bathrooms. *Id.* at 6.[7] In 1992 and 1993 alone, clinics in fifteen states reported 71 chemical attacks. *Id.*[8]

Most alarmingly, as Congress noted, the violence has escalated to murder.[9] The Senate Committee noted that the shooting

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[6] Other sources confirm that incidents of arson, vandalism, and death threats had increased dramatically in 1992 and 1993. *Incidents 1997* at 1.

[7] Butyric acid creates an intolerable stench and causes nausea, vomiting, headaches, dizziness, inflamed eyes and skin, and difficulty in breathing. Several people have required hospitalization after such attacks. *Id.*

[8] From 1994, the year of FACE's enactment, through the first two months of 1997, abortion providers reported 40 bombings, arsons, and attempted bombings or arsons, 113 death threats, and 104 incidents of vandalism. *Incidents 1997* at 1.

[9] Michael F. Griffin, who murdered Dr. Gunn, is now serving a life sentence. *Antiabortion Activist is Convicted, Sentenced to Life in Killing at Clinic*, Wash. Post, Mar. 6, 1994, at A22. These murders did not stop with the passage of FACE. In two separate incidents in Florida and Massachusetts, Dr. John Bayard Britton, escort James H. Barrett, and clinic employees Shannon Lowney and Lee Ann Nichols were shot to death by anit-choice extremeists in 1994. Paul Hill shot and killed Britton and Barrett and wounded Barrett's wife outside the Ladies Center abortion clinic in Pensacola, Florida on July 29, 1994. He was convicted under FACE for the murders of Britton and Barrett and sentenced to two concurrent life terms on December 2, 1994. *See United States v. Hill*, 893 F. Supp. 1034, 1039, 1044, 1048 (N.D. Fla. 1994)(separate opinions); *Two Life Terms for Killer at Abortion Clinic*, N.Y. Times, Dec. 3, 1994, at A9. On December 30, 1994, John C. Salvi III gunned down Lowney at Planned Parenthood in Brookline, Massachusetts, drove up the street to the Preterm clinic, and killed Nichols. He wounded five orthers at the two clinics. Salvi was recently convicted of the murders of Lowney and Nichols and sentenced to two consecutive life terms. *Timeline: Key Events in the Clinic Shootings*, Boston Herald, Mar. 19, 1996, at 3.

death of Dr. David Gunn in March 1993 "was a tragic end to years of threats, blockades, and personal attacks he had encountered." S. Rep. at 3-4. In addition to these murders, Congress noted that abortion providers and clinic staff had been the targets of other shootings resulting in serious injuries. In December 1991, a man in a ski mask open fired with a sawed-off shotgun at a clinic in Springfield, Missouri. He wounded two clinic staff members, including the office manager, who was paralyzed as a result of the shooting. S. Rep. at 4. In August, 1993, Rachelle Renae Shannon, an active participant in Oregon's anti-choice movement, fired several shots from a .32-caliber gun, wounding Intervenor-Respondent Dr. Tiller outside his clinic in Wichita, Kansas. Dirk Johnson, *Abortions, Bibles and Bullets, and the Making of a Militant*, N.Y. Times, Aug. 28, 1993, at A5; Tiller Aff. ¶ 7.

The Senate Committee further cited death threats directed at abortion providers. S. Rep. at 10. One letter stated: "Hey . . . [Dr.] Boyd. Those babies didn't know when they were dying by your butcher knife. So now you will die by my gun in your head very soon - and you won't know when - like the babies don't. Get ready your [sic] dead." *Id.* (Statement of Fairmont Center, Senate Committee on Labor and Human Resources Committee, June 2, 1993). It cited threats directed at providers' families as well. Dr. Norman Tompkins of Dallas, Texas received the following message on his answering machine: "I'm going to cut your wife's liver out and make you eat it. Then I'm going to cut your head off . . .." *Id.* (written testimony of Norman T. Tompkins, M.D., House Subcommittee on Crime and Criminal Justice, Committee on the Judiciary, Apr. 1, 1993). The Senate Committee noted that "[a] member of the Pro-Life Action Network confronted Dr. Tompkins' wife and shouted, `Aren't you afraid I'm going to kill you?'" *Id.*

The escalating violence created a climate of terror for reproductive health care providers and patients. Pablo Rodriguez, M.D., a clinical assistant professor of Obstetrics and Gynecology at Brown University Medical School and the Medical Director of Planned Parenthood of Rhode Island, asked the Senate "to walk just a few yards in my shoes and feel what thousands of health care providers across the country feel every day of their lives." Senate Hearings Before the Senate Comm. on Labor and Human

Resources, 103d Cong., 1st Sess. 4 (1993)(Testimony of Pablo Rodriguez, M.D.). Dr. Rodriguez described his experiences as a reproductive health care provider:

> In the beginning, the harassment was the usual nasty letter and graphic pictures of dismembered fetuses; but slowly it became more aggressive. I began receiving strange packages with dolls inside, as well as subscriptions to gun magazines and hunting lodges, showing pictures of dead animals hanging by their extremities. Then the "Wanted Posters" began to appear. . . .Then the doors and locks to our clinic were glued on multiple occasions culminating with three episodes of forceful blockading of our clinic. . . . The day Dr. Gunn was shot, I knew that my life would irrevocably change. One week after his death, as I was driving my mother to the bus station, I realized that my car was steering poorly. Once I dropped her off, I examined my tires and found that there were 45 nails deeply embedded in them; a fortunate finding considering that I was driving over 50 miles an hour on the highway. That evening, when I returned home, still unaware of the location of this act of vandalism, my wife painfully discovered with her foot that my driveway was "booby-trapped" with roofing nails cleverly buried under the snow. An image of my young children running and skinning their knees on that same section of driveway has filled my heart with a fear that, until this day, I have not been able to shake off. The following week I received a bill for an insurance policy on my wife's life, which we had not applied for.

Id. at 3-4.

These legislative findings reveal that Congress enacted FACE to address a nationwide crisis of violent, obstructive, threatening, and destructive conduct directed at reproductive health care providers and patients.

B. CONGRESS FOUND THAT ANTI-ABORTION VIOLENCE AND OBSTRUCTION ARE

DESIGNED TO AND HAVE SUCCEEDED IN ELIMINATING ACCESS TO ABORTION SERVICES.

Congress also made specific findings on anti-choice activists' success in carrying out their goal of curtailing women's access to reproductive health care. Indeed, Congress found that the murders and other acts of violence directed at reproductive health care providers were having exactly their intended effect, in that "[t]he express purpose of the violent and threatening activity . . . is to deny women access to safe and legal abortion services. Anti-abortion activists have made it plain that this conduct is part of a deliberate campaign to eliminate access by closing clinics and intimidating doctors." S. Rep. at 11. Indeed, anti-choice organizations across the country had candidly admitted that a major goal of their violent and intimidating actions is to harass and frighten away physicians from providing abortion services; physicians are considered the "weak link" in women's ability to obtain such health care. *Id.*; *see* William Booth, *Abortion Battle Fatigue; Slain Physician's Replacement Vent Fears, Frustration*, Wash. Post, May 7, 1993, at A3 (quoting Operation Rescue co-founder Keith Tucci).

Operation Rescue Coordinators testified at a House hearing on FACE that anti-choice groups openly endorse force and violence, including the destruction of facilities and murder of physicians, to achieve their stated objective of eliminating access to abortion. S. Rep. at 11. In the words of one such coordinator: "We may not get laws changed or be able to change people's [sic] minds. But if there is no one willing to conduct abortions, there are no abortions." *Id.* (citing Sandra Boodman, *The Dearth of Abortion Doctors*, Wash. Post, Apr. 20, 1993, at Z7). Congress also relied on findings by federal courts that "the 'avowed intent' of the blockaders was to shut down clinics and prevent abortions." S. Rep. at 11 (quoting *Women's Health Care Servs. v. Operation Rescue*, 773 F. Supp. 258, 261-62 (D. Kan. 1991)); *see National Organization for Women v. Scheidler*, 765 F. Supp. 937, 944 (N.D. Ill. 1991) ("[t]he motivation for destroying clinic property, threatening clinic employees, and blocking access . . . was . . . to . . .

further [the] antiabortion cause by limiting the availability of abortion services . . ."), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd on other grounds*, 114 S. Ct. 798 (1994); *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1493 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part on other grounds, vacated in part sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

To achieve their stated purpose of shutting down clinics, some leaders of the anti-choice movement preach that the killing of doctors who perform abortions is justified "on behalf of the unborn." S. Rep. at 4 (testimony of Michael Bray, Coordinator of Operation Rescue, Washington D.C.).[10/] Anti-choice militants also widely distribute various self-help guides advocating violence against doctors and clinics. For example, an "action manual" entitled "The Army of God" is designed to assist anti-choice militants in conducting a wide panoply of illegal, destructive, and violent activities; this step-by-step guide to terrorism closes with a chilling "Declaration" calling for the killing of abortion providers. *See* Timothy Egan, *Is Abortion Violence a Plot? Conspiracy is Not Confirmed*, N.Y. Times, June 18, 1995, at A1, A18; Stephen J. Hedges, *Abortion: Who's Behind the Violence*?, U.S. News & World Rep., Nov. 14, 1994, at 55.[11/]

[10/] Anti-abortion extremists have continued this strategy after the passage of FACE. *See* Robert O'Harrow, Jr. & Bill Miller, *U.S. Probe May Focus on Clinic Suspect; Panel's Look at Antiabortion Violence Likely to Include His Activities*, Wash. Post, Jan. 5, 1995, at A4 ("Defensive Action" petition, organized by Paul Hill and signed after the murder of David Gunn, claims that the murder was justified and encourages "all godly action necessary [to prevent abortions], including the use of force"). Only one week before the murder of Britton and Barrett, Reverend David Trosch, a prominent anti-abortion fanatic, sent a letter to 1,000 people declaring a time in the future when "[w]e will see the beginning of massive killing of abortionists and their staffs." Judy Lundstrom Thomas, *Abortion Foes Vow to Kill; U.S. Probes Signers of Death Declaration*, Ariz. Republic, Aug. 8, 1994, at A1 (quoting letter from Rev. David Trosch, a Catholic priest from Mobile, Alabama, to Members of Congress (July 16, 1994)).

[11/] Another popular piece of militant anti-choice literature is Joseph Scheidler's *Closed: 99 Ways to Stop Abortion*, a handbook "which advocates unlawful methods of interfering with the operations of women's health centers." *National Organization for Women v. Scheidler*, 968 F.2d 612, 615 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

The concerted effort by anti-choice militants to deter physicians from providing abortion services has been effective. Congress recognized that these extreme activities have exacerbated an already severe shortage of physicians who are trained and willing to provide abortions. S. Rep. at 16-17 (citing David A. Grimes, *Clinicians Who Provide Abortions: The Thinning Ranks*, 80 Obstetrics & Gynecology 719 (1992)). When FACE was enacted, eighty-three percent of counties in the United States had no abortion provider. S. Rep. at 17, n.29 (citing Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persp. 106 (1990)).[12]

The Senate Committee recognized that anti-choice violence caused many physicians to take extreme protective measures such as installing bullet proof glass and wearing bullet proof vests, and intimidated others into ceasing to perform abortions. S. Rep. at 17. Indeed, the number of abortion providers nationwide dropped by eight percent between 1988 and 1992. Henshaw & Van Vort, *supra*, at 106; *see also* Sandra Boodman, *A Tale of Two Dallas Abortion Doctors: One Surrendered, One is Fighting On*, Wash. Post, Apr. 8, 1993, at A16. The Senate Committee noted that in the year after Dr. Gunn's slaying in March 1993, at least eight physicians stopped performing abortions. S. Rep. at 17. Dr. James S. Todd of the American Medical Association testified that:

Due to the growing violence against physicians and

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[12] The shortage of abortion services has persisted subsequent to the passage of FACE. *See* Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp, 54, 57 (1995); Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States 1991-92*, 26 Fam. Plan. Persp. 100 (1994). Moreover 30% of women of chaildbearing age live in a county in which no abortion services are available. Henshaw & Van Vort, *supra* at 105. *See also* Feminist Majority Foundation, *1995 Clinic Violence Survey Report* 7 (1996) [hereinafter *1995 Survey*] (9% of clinics responding to a nationwide survey reported that staff members had quit in 1995 as a result of anti-abortion violence and harassment); *Doctor Says He Won't Do Further Abortions*, Lakeland Ledger, Mar. 17, 1996, at B5 (out of concern for his safety, Dr. Gostal Arcelin notifies Christians for Life that he will stop providing abortions at Melbourne medical facility).

> health care professionals generally, the AMA believes that [FACE] represents a critical step in permitting dedicated health care professionals to deliver lawful medical services without fear of harassment, threats or violence. . . . Unless the issue of continued violence at health care facilities is directly confronted, the practice of medicine will be severely affected.

Id. at 16 (emphasis added). Congress found that, as a direct result of the widespread and organized anti-choice violence, clinics were finding it nearly impossible to fill physician positions. *Id.* at 17; *see* Sara Rimer, *Abortion Clinics Seek Doctors But Find Few*, N.Y. Times, Mar. 31, 1993, at A15; Sandra Boodman, *The Dearth of Abortion Doctors*, Wash. Post, Apr. 20, 1993, at Z7.

The reduction in the number of reproductive health care providers results in increased costs and travel burdens on providers and patients alike, who must travel greater distances to obtain care. Congress recognized that a significant number of patients and providers travel interstate to obtain or provide reproductive health care services. S. Rep. at 31 (citing *Bray*, 506 U.S. at 264 ("accept[ing] the district court's finding that substantial numbers of women travel interstate to seek abortion services"); S. Rep. at 31 & n. 46 (identifying Respondent-Intervenor Dr. Wicklund, who provides abortion services in Minnesota, Montana, North Dakota, Wisconsin and parts of Canada); S. Rep. at 31 (forty-four percent of the patients at Respondent-Intervenor Dr. Tiller's clinic come from out-of-State) (citing *Women's HealthCare Servs. v. Operation Rescue*, 773 F. Supp. 258, 266-67 (D. Kan. 1991), *rev'd on other grounds*, 24 F.3d 107 (10th Cir. 1994)); *New York State NOW v. Terry*, 704 F. Supp. 1247, 1259-60 (S.D.N.Y. 1989) ("undisputed facts establish that defendants' activities obstruct access to medical facilities to women who have traveled from out-of-state"), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).[13/]

[13/] One study shows that one-quarter of women undergoing abortions in nonhospital facilities travel more than fifty miles from their home to obtain abortions in clinics and eight percent of those women travel more than one hundred miles. Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp. 54, 55-56 (Mar./Apr. 1995).

The shortage of abortion providers particularly burdens low-income, rural, and young women who lack the means to travel to a provider or pay for the procedure. These women are more likely to obtain an abortion later in their pregnancies, when health risks are significantly greater and costs for the procedure are substantially higher, or to be forced to carry an unwanted pregnancy to term. See Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plan. Persp. 246, 248-50 (1991); *see infra* Part C.[14/] Moreover, because low-income women disproportionately rely on clinics for a wide variety of reproductive health care, *see* Jennifer J. Frost, *Family Planning Clinic Services in the United States, 1994*, 28 Fam. Plan. Persp. 92 (1996), they suffer particular harm when clinics are forced to close their doors. For example,

> The Blue Mountain Clinic in Missoula, Montana was burned to the ground in 1992, following several years of escalating blockades. Seventy percent of the clinic's pre-natal program was comprised of Medicaid patients who had traveled an average of 120 miles for their appointments due to lack of care in their own areas. Western Montana's growing population of uninsured, working poor, and Medicare/Medicaid dependent citizens suffered a severe curtailment of medical services as a result.

S. Rep. at 5 (Testimony of Willa Craig, Executive Director, Blue Mountain Clinic, Missoula, MT, Senate Committee on Labor and Human Services, May 12, 1993).

[14/] The plight of low-income women who need to obtain abortions is dramatically illustrated in a case before the Florida Supreme Court. In *Florida v. Ashley*, 670 So.2d 1087 (Fla. Dist. Ct. App. 1996), *cert. granted*, No. 87,719 (Fla. 1996), Kawana Ashley, a 19 year old pregnant woman who could not afford an abortion shot herself in the stomach in a desperate attempt to self-abort. The state charged Ms. Ashley with manslaughter and third-degree felony murder. The lower courts upheld the manslaughter charge and dismissed the murder charge. The case is pending before the Florida Supreme Court.

These legislative findings demonstrate that Congress enacted FACE in response to anti-choice extremists' success at causing a shortage of abortion providers through violent and obstructive acts.

C. CONGRESS FOUND THAT ANTI-ABORTION VIOLENCE AND OBSTRUCTION DIRECTLY JEOPARDIZE WOMEN'S HEALTH.

In enacting FACE, Congress also recognized that the violent and obstructive tactics employed by anti-choice organizations severely endanger women's health. S. Rep. at 14-16. Aggressive and charged encounters at reproductive health facilities impede access to necessary health care at a crucial time and produce traumatic physical and psychological effects. *Id.* The harms caused by the assaults, arsons, bombings and chemical attacks are self-evident; but those caused by blockades and threatening conduct can be equally devastating. In addition to the immediate injuries caused by "pushing, shoving, . . . and other violent acts," *id.* at 17, anti-choice conduct can exacerbate existing medical conditions and increase the risk of post-procedure complications. *Id.* at 15 (quoting *Pro-Choice Network*, 799 F. Supp. at 1427)). Targeting women immediately prior to, during, and after a surgical procedure heightens health risks. Stress and anxiety induced by anti-choice "rescues" cause hypertension and elevated blood pressure in patients, who then often require sedation or special counseling; "[p]atients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery." *Pro-Choice Network*, 799 F. Supp. at 1427; *see also Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2521 (1994) (recognizing similar findings by *Madsen* lower court). One researcher found that anti-choice blockades and attacks cause patients to experience "shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention," which endanger their medical safety. Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Anti-abortion Demonstrations*, 12 Population & Env't 4, 380-81 (1991). These medical conditions, in turn, force physicians to anesthetize their patients with higher doses of sedatives or, if the hypertension is

severe, to turn the patient away altogether. *Pro-Choice Network*, 799 F. Supp. at 1427. The medical distress also can "lead[] to incomplete or inaccurate health history reports which the client completes soon after entry to the [clinic]." *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 859 F.2d 681, 683 (9th Cir. 1988). It also can prolong a patient's recovery time. *See, e.g., American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 662 (E.D. Pa. 1985).

Additionally, women who are prevented from gaining access to a clinic by a blockade, intimidated from entering a clinic because of threatening protests, or sent home because of their anxiety, must delay obtaining their abortions. As one court recognized:

> This delay can increase the risks associated with an abortion. For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded . . .complications may result.

Pro-Choice Network, 799 F. Supp. at 1427.

D. CONGRESS ENACTED FACE TO ADDRESS THE INADEQUACIES IN EXISTING FEDERAL LAW AND STATE AND LOCAL

LAW ENFORCEMENT'S FAILURE EFFECTIVELY TO ADDRESS THE NATIONWIDE ASSAULT AGAINST REPRODUCTIVE HEALTH CARE PROVIDERS AND PATIENTS.

Congress recognized that existing federal, state, and local laws could not adequately prevent the destructive anti-choice conduct around the country. S. Rep. at 17-21. The Senate Report notes that *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), severely restricted federal protection of the constitutional right to reproductive choice established in *Roe v. Wade*, 410 U.S. 113 (1973), and reaffirmed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). S. Rep. at 18.[15/] In contrast, anti-choice militants interpreted *Bray* as a message that they would not be held accountable for their violent and obstructive activities. Anti-choice activist Joseph Scheidler has stated: "We haven't been successful in getting the Human Life Amendment passed or in getting Roe overturned. When you get doctors out, you can have all the laws on the books you want and it doesn't mean a thing." Sandra Boodman, *Abortion Foes Strike at Doctors' Home Lives*, Wash. Post, Apr. 8, 1993, at A1, A17.[16/] Congress correctly recognized that new federal protections were necessary to fill "the serious gap in the Federal laws [created by *Bray*]." S. Rep. at 18.

In addition, Congress recognized the failure of state and local law enforcement to protect access to reproductive health clinics. *Id.* at 19-21. Congress found that in some instances "local officials have willfully refused to act in response to anti-abortion violence and blockades." *Id.* at 19.[17/] In others, local officials

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[15/] In *Bray*, the Supreme Court held that the deprivation clause of 42 U.S.C. § 1985(3) did not protect women's privacy rights against anti-choice violence, coercion and intimidation.

[16/] A "Human Life Amendment" refers to a proposed constitutional amendment that would declare a fertilized egg a "person" under the Contitution, and allow states to ban virtually all abortions.

[17/] The mayor of Buffalo made the following remark about Operation Rescue's "Spring of Life" invasion: "If they close down one abortion mill . . . then I think they'll have done their job." *Id.* at 19 n.34 (citing David Treadwill, *Buffalo Braces for Massive Abortion Protests*, Los Angeles

refused to enforce the law because they sympathized with the blockaders. *Id.* Other local officials simply were overwhelmed by the sheer number of militant extremists. *Id.* at 20. At a blockade of Respondent-Intervenor Commonwealth Women's Clinic, "the city's entire police force of 30 uniformed officers faced blockades involving as many as 240 persons, and the city could not effectively combat the blockaders' military-style tactics." S. Rep. at 20.[18]

Congress also recognized that "a patchwork of State and local laws is inherently inadequate to address what is a nationwide, interstate phenomenon." S. Rep. at 19. Not only are State and local laws insufficient because their low penalties have little deterrent effect, *id.*,[19] but they do not effectively reach interstate conduct. Thus,

> a State cannot easily reach persons in other States who may have planned the illegal acts . . . . In these circumstances, as Attorney General Reno noted, local law enforcement efforts in different regions are impeded by difficulties in sharing information and coordinating responses.

Id. at 20. At the Senate hearings, New York Attorney General Robert Abrams presented examples of assaults on New York clinics by anti-choice activists from Georgia, California, Virginia, and elsewhere. *Id.* The City Manager of Falls Church, Virginia, testified that because the blockaders of clinics in his area came from other states, they were largely beyond the reach of Virginia law and state court injunctions. *Id.* Attorney General Reno echoed the message, testifying that "the problem transcends the ability of any single local jurisdiction to address it." *Id.* at 21 (testimony of Janet

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Times, Apr. 21, 1992). The mayor promised local law enforcement would take action only after the State Attorney General threatened to sue him. S. Rep. at 19 n.34.

[18] *See also Libertad v. Welch*, 53 F.3d 428, 434 (1st Cir. 1995) ("local law enforcement officials expend a significant amount of time and resources; between forty-five and sixty officers are usually deployed for each protest").

[19] "[T]he offenders frequently return to the blockade or invasion immediately after their arrest, having been charged with fines equivalent to those for a speeding ticket . . . ." *Id.* at 20-21.

Reno, United States Attorney General); *see also National Organization for Women v. Operation Rescue*, 726 F. Supp. at 301-02 (finding "uncontradicted evidence that Operation Rescue and Project Rescue have been the motivating force behind other blockades similar to those presently threatened," and quoting from Operation Rescue leader Randall Terry's letter celebrating anti-abortion "rescues" in 46 cities, as well as successes in shutting down clinics in 17 cities).

Anti-choice zealots travel across the country targeting a few regions at a time. For example, the massive "Summer of Mercy" assaults and blockades so overwhelmed the local Wichita police that 100 federal marshals had to be called in to control the mob violence, and clinics were forced to close for six days. *United States v. Cooley*, 787 F. Supp. 977, 980 (D. Kan. 1992), *vacated and remanded*, 1 F.3d 985 (10th Cir. 1993). This "success" by Operation Rescue led it to launch other missions, such as the massive April 1992 "Spring of Life" blockade campaign in Buffalo, in which hundreds of blockaders engaged in orchestrated shut-downs of area clinics. *See* Jeannie Ralston & Barbara Maddux, *The Great Divide*, Life, July 1992, at 32.[20/]

The congressional findings on inadequacies in the existing federal law and the failures of state and local law enforcement to protect access to reproductive health care facilities lend further support to Congress' authority to enact FACE pursuant to the Commerce Clause.

[20/] Shortly therafter, anti-abortion leader Reverend Schenck conducted a nationwide "twelve-week Operation Rescue training program designed to teach leaders in the anti-abortion movement the most effective techniques to further their cause." Lynne Bumpus-Hooper, *Anti-Abortion Leader Draws `Battle Plan,'* Orlando Sentinel Trib., Feb. 21, 1993, at B3. He urged anti-abortion activists, *inter alia*, to become "subversives," and to blockade and gain control of medical facilities. *Id.*

CONCLUSION

In light of the extensive legislative findings reflecting that Congress enacted FACE to address a nationwide campaign of violence and obstruction directed at reproductive health care providers, to protect public health and safety, and to ensure that women are able to exercise their constitutional right to choose, Intervenor-Respondents respectfully request that the petition for a writ of certiorari be denied.

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